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In the Supreme Court of the United States

OCTOBER TERM, A. D. 1949.

No. . . . . .

INSURANCE COMPANY OF NORTH AMERICA,
Petitioner,

vs.

CARL T. HOWE,
Respondent.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable, The Chief Justice and the Associate Justices of the United States:

Insurance Company of North America hereby petitions for the issuance of a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit whose judgment of December 14, 1949, affirmed the judgment below.

STATEMENT OF THE MATTER INVOLVED.

This controversy arises from a claim asserted by Carl T. Howe against Insurance Company of North America to recover the proceeds of Horse Livestock Policy No. 1-HL-17953 in the amount of $5,000.00 upon a race horse named Menex. The animal is claimed to have died June 27, 1947, as the result of an accident sustained on the 2nd day of May preceding, while racing at Tanforan Track near San Francisco, California. The insurer denied the claim because of the insured's failure to give immediate telegraphic and written notice of injury to the insurer's head office; his failure to give immediate notice to the insurer of

death of the animal; his failure to submit sworn proof of loss within 30 days, and his further failure to submit, at any time, veterinarian's affidavit on insurer's form, all as required by the policy, and by the applicable law of Ohio in which state the action arose.

QUESTION PRESENTED.

Has a Circuit Court of Appeals properly performed its duty of applying appropriate local law where it holds that, under a policy requiring written notices of injury and death to an insurer's head office, such notices may, in fact, be given orally to a local representative; that obligations to submit proof of loss and veterinarians' affidavits within 30 days are met by filing proof of loss in 45 days without veterinarians' affidavits; where the decisions of the local court of last resort are to the effect that policy conditions must be strictly met?

REASONS FOR ALLOWANCE OF THE WRIT.

The established rule, that Federal Courts must correctly apply local law as decided by State Courts of last resort, has special importance when questions of insurance policy interpretation are involved, since insurance in its many forms is a matter of universal interest. Millions of people have insured their lives, homes, household goods, automobiles, etc. It is a matter of great, general importance to insurers and policyholders alike that the law be clarified by our highest court, regarding policy conditions the violation of which will void the policy. Heretofore, compliance with policy conditions has been required by the courts. Premiums are based upon experience anticipated under the hazards of the policy as written. If provisions regarding notice need not be complied with and the insurer is bound nonetheless upon the occurrence of the ultimate loss, without an opportunity to minimize or avoid

the loss, premiums must necessarily be increased to the prejudice of all policyholders. We believe that the decision of the Court of Appeals on this important question is in conflict with applicable decisions of the Ohio Supreme Court. This Court held in *U. S. v. South-Eastern Underwriters Assn.*, 322 U. S. 533, that insurance business is interstate commerce. Insurance companies generally operate a nationwide business.

JURISDICTION.

The jurisdiction of this Court to grant the Writ is invoked under Judicial Code, Title 28, Section 1254 (1). The judgment of the United States Court of Appeals for the Sixth Circuit was rendered December 14, 1949, and this petition is filed within the statutory period. Judicial Code, Title 28, Section 2101 (c).

PRAYER FOR RELIEF.

WHEREFORE the petitioner, by its counsel, prays the issuance of a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit to the end that the judgment may be reversed and for such other relief as to the Court may seem appropriate.

JAMES A. BUTLER,

Attorney for Petitioner,
Insurance Company of
North America.

In the Supreme Court of the United States

OCTOBER TERM, A. D. 1949.

No. .....

INSURANCE COMPANY OF NORTH AMERICA,
Petitioner,

vs.

CARL T. HOWE,
Respondent.

BRIEF IN SUPPORT OF PETITION.

ASSIGNMENTS OF ERROR.

The Circuit Court of Appeals erred:

1. By departing from the applicable local law as decided by the Ohio Supreme Court, the case being one involving local law;
2. In affirming the judgment of the District Court which was based on an erroneous interpretation of applicable Ohio law and on inadequate proof.

STATEMENT OF FACTS.

The parties will be referred to as they stood in the trial court. Carl T. Howe filed a petition in Cuyahoga County, Ohio, Common Pleas Court against Insurance Company of North America. On the grounds of diversity of citizenship, Insurance Company removed the case to the U. S. District Court for the Northern District of Ohio, Eastern Division. Trial was had in that court resulting in a jury's verdict in favor of the plaintiff for $5,300. Judgment was entered accordingly. The U. S. Court of Appeals for the Sixth Circuit affirmed the judgment of the trial court, by order, without writing an opinion.

Photostatic copy of the policy is contained in the Record, pages 161-166. The policy clearly sets forth on its first page:

"Conditions Avoiding Policy"

These conditions require: immediate notice of illness or injury by telegraph to the head office at 1600 Arch Street, Philadelphia, Pa., and to be confirmed in writing; immediate notice of death to the head office stating date and cause and name of attending veterinarian; submission of sworn proof of loss and veterinarian's affidavit on company forms within 30 days; right to have a post-mortem performed. No officer, agent or other representative of the company has power to waive any condition except in writing attached to the policy.

Defendant, through an agent, Estabrook & Co., wrote the policy upon Menex, owned by the plaintiff. Howe, who is engaged in the dry cleaning business in Cleveland, owned a string of race horses which he sent to tracks all over the United States in charge of George Cummins, a free lance trainer. Howe testified that on May 2, 1947, the trainer phoned him from San Francisco to report that Menex had that day won a race; was injured in the race but not seriously; that he had been looked over by the track veterinarian; and that the trainer expected to take Menex to Portland, Oregon, shortly, for races there (R. 84, 85).

About the 12th or 13th of May, plaintiff went to Portland where he conferred with the trainer and saw Menex who was then under the care of a veterinarian, Dr. Phelps, who lanced Menex' leg (R. 87, 88). About May 25, plaintiff returned to Cleveland. Thereafter, he had no word from the trainer or anyone else about the horse until he received a letter written by the trainer at Vancouver, B. C., on July 5.

The letter reported that Menex died June 27 at a rest farm at Grant's Pass, Oregon. It stated that Menex' suspensory ligament had been cut almost in two and that in-

fection set in from which the animal died (Ex. A, R. 177). Plaintiff admitted that no telegraphic notice and no notice in writing was sent to the head office (R. 86). Plaintiff further admitted that he was familiar with the policy provision requiring telegraphic notice of injury to the head office (R. 87). Plaintiff made oral reports to agent George Estabrook in Cleveland.

Plaintiff's only other witness was Estabrook who testified that about May 5 he orally conveyed the report of injury to Fred Treacy in defendant's service office in Cleveland. He says that he also reported orally to Treacy a telephone call from Howe at Portland to the effect that Menex was improving. On July 7, Howe and Estabrook called on Treacy at the Cleveland service office, orally reported that Menex had died on June 27, and showed Treacy the letter from the trainer, Cummins. The first time names of veterinarians were given to Treacy was on August 18 (R. 90).

Treacy denied having received any reports about Menex in May. He said that the first information that he received was on July 7 when Estabrook and Howe called on him and reported that Menex had died (R. 121). The following day, Treacy wrote to the head office passing on the report given to him by Estabrook and Howe (R. 122 and Ex. B, R. 178).

Estabrook also testified that on October 7, 1947, he called at the defendant's head office in Philadelphia and there conferred with H. J. McCormick, an adjuster; Alonzo L. Tyler, Assistant Marine Loss Manager; and Clinton Bird, Assistant Secretary of the company. All of these head office men testified that the first information they had about Menex was Treacy's letter of July 8, reporting that the horse had died on June 27 (R. 96, 136, 143). They also testified that Treacy had a duty to inform the head office of any information he might receive about Menex.

At their meeting on July 7, Treacy gave Howe the forms which were to be filled in and signed by him as

owner, and the forms for affidavits by veterinarians (R. 78, 79). Howe took the forms. The policy required that these forms be completed and submitted within 30 days after death of the insured animal. On August 18, 45 days after June 27, the date on which Menex is supposed to have died, Howe delivered to Treacy the executed proof of loss blank accompanied by bills and letters from veterinarians (R. 90). No affidavit from any of the veterinarians has ever been submitted to any representative of defendant.

At the trial, plaintiff's evidence consisted only of his own testimony and that of the agent, George Estabrook, supplemented by 11 exhibits. Plaintiff offered no testimony of any witness having personal knowledge that Menex had died, or of the condition or treatment of Menex after May 25.

Defendant moved for judgment after opening statement of plaintiff's counsel (R. 18), and again at the end of plaintiff's evidence (R. 95), on the basis that plaintiff admitted failure to comply with policy conditions regarding notice, and the further ground that plaintiff had offered no admissible proof that Menex had died. The court overruled the first motion and reserved decision on the second one. At the end of all the evidence in the case, defendant renewed its motion for judgment (R. 152). The court then overruled the motion (R. 153).

ARGUMENT.

Ohio Law Controls.

Since the decision of *Erie R. R. Co. v. Tompkins,* 304 U. S. 64 (1938), there have been several decisions of the Supreme Court of the United States holding that federal courts in dealing with questions of general commercial law such as the construction of contracts of insurance are bound to follow the decisions of the appropriate state court. That was announced in *Ruhlin v. New York Life Ins. Co.,* 304 U. S. 202 (1938). See also *Rosenthal v. New York Life Ins. Co.,* 304 U. S. 263 (1938). In the *Rosenthal* case, the Eighth Circuit Court of Appeals decided the questions as matters of general law according to the view of the court as to the weight of authority. Petitioners claimed that the interpretation of the policy was governed by the law of Missouri. In its per curiam opinion, the Supreme Court said at page 264:

> "While respondent contends that the decision below is not in conflict with the local law, it is not necessary for us to determine that question. It is enough to say that the questions to be decided are those of state law and should have been determined according to the decisions of the state court. Erie R. Co. v. Tompkins, decided April 25, 1938 (304 U. S. 64, ante, 1188, 58 S. Ct. 817, 114 A. L. R. 1487); Ruhlin v. New York L. Ins. Co., decided May 2, 1938 (304 U. S. 202, ante, 1290, 58 S. Ct. 860)."

Ohio Law.

Ohio law upholds the right of the insurer to rely upon express policy conditions regarding notice. The Ohio Supreme Court announced this rule in the case of *Kornhauser, Receiver v. National Surety Co.,* 114 O. S. 24 (1926).

The Surety Co. had issued a fidelity bond in favor of Export Trading Co. of which Kornhauser later became receiver. The bond protected Trading Co. against loss as a result of misconduct upon the part of officers named in a

schedule. Two of the senior officers, Fraunhofer and Haas, made defalcations. The bond required the employer, upon becoming aware of any evidence of dishonesty, to give immediate notice in writing, and, in any event, not later than 5 days, to the home office of the company. The trial court granted defendant's motion for judgment. The Court of Appeals affirmed. The Ohio Supreme Court affirmed both judgments below. In conclusion, the Supreme Court said in its opinion at page 39:

> "Notice was not given of fraud and dishonesty upon the part of Fraunhofer and Haas until December, 1921. It is conceded that this dishonesty occurred several months before that time, and at least one director of the company had knowledge thereof and remained a director for a considerable period after that time. In view of that fact, notice was not given in accordance with the terms of the bond, and judgment must therefore be affirmed."

The precise point of notice to an authorized agent of the insurer, of the violation of a condition avoiding the policy was decided by the Ohio Supreme Court in the case of *Ohio Farmers' Ins. Co. v. Titus,* 82 O. S. 161 (1910).

Titus bought policies of insurance on his barn and on the contents thereof. A fire occurred. The loss was ascertained but the insurer refused to pay on the ground that the policies provided that they would be void if the subject of insurance, or any part thereof, or the real estate, or any part thereof, was and should thereafter become encumbered by mortgage or otherwise. In the litigation it was averred that after the issuance of the policy and before the fire occurred, the real estate on which the barn was situated was encumbered by a mortgage in the sum of $4,000.00 without any agreement therefor being endorsed on the policy.

The evidence showed that when the policy was issued, there was a mortgage for $2,500.00. Titus claimed that when he increased the mortgage to $4,000.00, he informed

the company's county agent of that fact, and that, subsequently, he paid premiums on the policy in question. The trial court submitted the issues to the jury who found in favor of the plaintiff. The Court of Appeals affirmed.

The Supreme Court modified the judgment of the lower courts by deducting the amount of the loss of the building. At page 171 of its opinion, the court said:

> "The insured had the policy in his possession and is presumed to know its provisions. These provisions are valid, they are usually found in such contracts, and are considered necessary for the protection of the company. They cannot be waived by the agent, excepting in the manner stipulated in the policy, and would afford very little protection to the company if they could be. (Union Central Life Ins. Co. v. Hook, 62 Ohio St. 256; The Eureka Fire & Marine Ins. Co., et al. v. Baldwin, 62 Ohio St. 368; Northern Assurance Co. of London v. Grandview Building Association, 183 U. S. 308.) To avoid them it must be shown that the company waived them or is estopped to enforce them, and this cannot be done by proof of acts or representations of the agent, not brought to the knowledge of the company."

The court concludes its opinion at page 173 in these words:

> "The making of the additional incumbrance and the failure to endorse being admitted, and there being no evidence tending to prove waiver by the company, the trial court should have directed a verdict for the company as to the first cause of action, and the judgment will be modified by deducting the amount of the loss of the building."

The *Titus* case was referred to with approval by the Ohio Supreme Court in the case of *Michigan Automobile Ins. Co. v. Van Buskirk,* 115 O. S. 598 (1927). It is to be noted that the *Van Buskirk* decision was four years later than the decision in *Myers v. Ins. Co.,* 108 O. S. 175 (1923), upon which the Court of Appeals relied in the instant case.

In the *Van Buskirk* case, the Supreme Court at page 604 said:

> "In Ohio Farmers' Ins. Co. v. Titus, 82 Ohio St. 161, 92 N. E. 82, this court held that a clause in an insurance policy substantially similar to the above was valid, and that the insurance company could not be deemed to have waived a mortgage incumbrance upon the property simply because its agents had notice or knowledge of the existence of the incumbrance.
>
> * * * * *
>
> "In support of the principle so announced, the per curiam cites the cases of * * * Northern Assurance Co. v. Grand View Building Assn., 183 U. S. 308, 22 S. Ct., 133, 46 L. Ed. 213. In the federal case cited, Mr. Justice Shiras admits the contrariety of decisions upon the legal point involved but states that the decided weight of authority supports the foregoing principle. There is no doubt that in the Ohio cases cited this court has been definitely committed to that principle, unless it has been modified by the rule announced by a majority of this court in Foster v. Scottish Union & National Ins. Co., 101 Ohio St. 180, 127 N. E. 865."

The facts in the case of *Foster v. Scottish Union & National Ins. Co., supra,* are easily distinguishable. In that case, the agent knew at the time the policy was first written of facts contrary to policy conditions which made it void *ab initio.*

In the instant case, the Court of Appeals expressly based its decision on *Myers v. Ins. Co., supra.* The decision rested on the mistaken belief that the Ohio Supreme Court had declared the current law of this state to the effect that notice to an agent would be construed as notice to the insurer at its home office, and that policy provisions to the contrary would be considered waived. The *Myers* case did not announce that principle of law, but only commented upon it by way of *dicta.* The *Myers* case specifically held the insurer not liable. It held valid express conditions

in the application for insurance, although the company's medical examiner admitted having received knowledge of the applicant's sickness before the policy was issued.

The Ohio law with regard to the insurer's qualified representative receiving notice, after the policy has been in existence, of a condition which would avoid the policy not being imputed to the company, is explicitly stated in the case of *Farmers' Ins. Co. v. Titus, supra,* and reaffirmed in the case of *Michigan Automobile Ins. Co. v. Van Buskirk, supra.*

Lower Courts Did Not Follow Ohio Law.

Plaintiff made no claim of waiver of policy provisions in his petition, briefs, or oral arguments. He erroneously contended that, under Ohio law, proof of any notice, oral or otherwise, to a representative of defendant was sufficient compliance with his obligation to the insurer. We quote from plaintiff's petition (R. 3):

> "Plaintiff further says that he has complied with and performed all of the conditions, requirements, covenants and things required of him by the terms of said contract and/or policy of insurance;"

The trial court, ignoring the established local law as announced by the Ohio Supreme Court, erroneously charged the jury as follows (R. 156, 157):

> "Thus, if you believe that Treacy was notified of the injury to Menex on or about May 5th, such knowledge would be assumed to have been transmitted promptly by him and would, as I think, constitute notice to the company as required by the policy."

Although plaintiff neither pleaded nor argued waiver of policy provisions, the trial court erroneously injected that issue into the case when he charged the jury (R. 157) as follows:

> "If you believe Estabrook's testimony that McCormick, Tyler, Bird, and others at the home office where

he was in conference with them on October 7th, told him, Estabrook, that no exception was taken to the lack of direct notice of the injury to the horse, but that it was lack of cooperation by the owner, Howe, I think that any further requirement of notice was waived or that adequate compliance was considered as having been made of the injury to the horse."

Defendant took specific exception to the parts of the charge quoted herein (R. 159).

The Court of Appeals failed to follow local law as announced by the Supreme Court of Ohio in *Kornhauser, Receiver v. National Surety Co., supra,* in *Ohio Farmers' Ins. Co. v. Titus, supra,* and in *Michigan Automobile Ins. Co. v. Van Buskirk, supra.* To the contrary, it relied upon *dicta* in the case of *Myers v. John Hancock Mutual Life Ins. Co., supra.* The judgment entry of the Court of Appeals contains this language (R. 193):

"And it appearing that the questions of fact involved were submitted to the jury under appropriate instructions pertaining thereto, compare Myers v. Insurance Co., 108 O. S. 175, 181 through 183, that the verdict of the jury is amply supported by the evidence, and that there is no prejudicial error in the rulings of the trial judge or in his instructions to the jury;

"It Is Therefore Ordered that the judgment of the District Court be and is affirmed."

Myers Case.

In the *Myers* case, the issue presented was whether the insurer had waived the express condition of the application that the applicant must still be in good health when the policy is issued. The applicant had been examined by Dr. Brady and approved. Two days later, he suddenly became ill with appendicitis. Dr. Brady, a personal friend of the applicant, learned of the illness but did not report it to the insurance company. A few days later, the insurer approved the application at its home office. A couple of days thereafter, the applicant died.

The insurer refused to recognize the claim and tendered back the premium which had been paid. The application contained a clause that the policy should be issued only in the event that the applicant is in the same condition of health at the date of issuance as at the date of application. The Ohio Supreme Court concluded that the defendant had not waived the express condition of the application by reason of Dr. Brady's failure to transmit information to the home office and the company's subsequent approval of the application. The court concludes its opinion in these words:

> "It follows that from both principle and authority Dr. Brady was not such an agent of the company that action upon the part of the company in approving the application for insurance can be held to have been a waiver of express conditions and stipulations because of the mere casual knowledge and information which came to him.
>
> "The judgment of the Court of Appeals is therefore affirmed."

The court's decision was in favor of the insurer upholding the express conditions of the application. By way of *dicta,* the court reasoned that notice to an agent expressly delegated to receive notice or who was placed in a position of general authority, will be considered notice to the principle. That, however, was not the question decided in the *Myers* case. The comment by way of *dicta* is not an expression of local law by the Ohio Supreme Court.

Plaintiff Did Not Comply.

In the instant case plaintiff failed to give notices of injury and death as required. He also failed to submit sworn proof of loss within 30 days. He never furnished affidavits from veterinarians. Should the claimed oral reports to Treacy be considered as sufficient compliance regarding notice, which we expressly deny, plaintiff still is in default as to proof of loss and veterinarian's affidavit.

At the trial, plaintiff offered no admissible legal proof that Menex was dead. He relied entirely on hearsay and self serving letters from persons who did not testify in court. Defendant had no opportunity to question the trainer or veterinarians. Plaintiff did not sustain the burden of proof. There was not sufficient evidence to submit the case to the jury.

OPINIONS BELOW.

The District Court wrote no opinion. Its memorandum overruling defendant's alternative motion for judgment or for new trial appears in the Record at page 184. The Court of Appeals wrote no opinion. Its order affirming the judgment of the District Court appears in the Record at page 193.

CONCLUSION.

WHEREFORE, Petitioner respectfully prays the issuance of a Writ of Certiorari.

JAMES A. BUTLER,
Attorney for Petitioner.

March 8, 1950.